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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

17 CR 417 (AKH)

5 ALI KOURANI,

6 Defendant.

7 -----x

8 New York, N.Y.
9 October 3, 2018
3:00 p.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

16 United States Attorney for the
Southern District of New York

17 EMIL BOVE

AMANDA HOULE

Assistant United States Attorneys

18 ALEXEI SCHACT

19 Attorney for Defendant

20 ALSO PRESENT: FBI Special Agent Joseph Costello
21 FBI Special Agent Keri Shannon

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1 THE COURT: Good afternoon.

2 THE DEPUTY CLERK: U.S. v. Kourani. Counsel, please
3 state your appearances for the record.

4 MR. BOVE: Good afternoon. Emil Bove and Amanda Houle
5 for the government. And we have with us Joe Costello and Keri
6 Shannon from the FBI.

7 MR. SCHACT: Good afternoon. Alexei Schact for
8 Mr. Kourani.

9 THE COURT: We have an application for bail.
10 Mr. Schact, do you want to present?

11 MR. SCHACT: Thank you, your Honor. I know you sat
12 through the suppression hearing, obviously, and you know the
13 facts of the case quite well. I just want to start by
14 saying --

15 THE COURT: Thank you for the flattery.

16 MR. SCHACT: It's truthful flattery. It is not
17 dishonest flattery.

18 THE COURT: Don't feel inhibited in any way. Tell me
19 what you want to tell me. Don't assume I know.

20 MR. SCHACT: Okay. This case, your Honor, I
21 suspect -- I know it's not like any other case I've ever had.
22 I suspect it's not like any other case that you ever had, just
23 in terms of the basic fact pattern. And I think the fact
24 pattern is part of the reason why you should grant my client
25 bail.

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1 As you'll recall, my client was the one who approached
2 the FBI with his lawyer at the time, Mark Denbeaux. That fact
3 in and of itself is obviously unusual, obviously in a case of
4 this sort. It's not the case that I've been involved with,
5 where there is someone, typically, someone involved in the drug
6 business who wants to be an informant and approaches the
7 government. It is relatively unusual that someone who ends up
8 facing these sorts of charges alleging material support for a
9 terrorist organization approaches the government.

10 He approached the government. He had about five
11 meetings or five meetings in which there are alleged to be
12 statements in which he essentially confessed to the crime,
13 according to the complaint. Those statements happened in about
14 2017. The complaint, the indictment, alleges that the criminal
15 conduct ended in about 2015. So that the alleged conduct here
16 is now several years old.

17 My client approached the government. After the first
18 meeting, and after actually all five meetings with the agents,
19 after he had confessed, they say, they let him leave each
20 meeting. And so, obviously, in the minds of the government,
21 and I think this is a reasonable supposition, they believed he
22 was not so dangerous that he needed to be arrested. Otherwise,
23 they would have arrested him.

24 Now, of course there came a time where they arrested
25 him, and that's why we're here. But, if he had truly been so

IA33KOUK

1 dangerous, such a threat to the public, that he needs to be
2 detained on bail, I submit to you that they would have arrested
3 him after the first meeting. Or the second or the third or the
4 fourth. Even after the fifth meeting, they didn't arrest him.
5 I don't remember the exact time period, but it was at least a
6 month until they did finally arrest him. So, that fact alone I
7 think counters their claim that he poses some kind of a threat
8 to the people of the United States.

9 Another factor regarding flight, your Honor, is for
10 the same reason, he is not really a flight risk. That again
11 gets to the unique facts here. As you know, the reason he
12 approached the government is because he wanted help to ensure
13 his children's safety in the United States, and his father and
14 sister who were in Lebanon. So what he was looking for --

15 THE COURT: There's three points to this. I think his
16 wife and children were in Canada.

17 MR. SCHACT: Yes.

18 THE COURT: His father, other members of his family
19 were in Lebanon.

20 MR. SCHACT: Correct.

21 THE COURT: And he was in Chicago.

22 MR. SCHACT: He was between the Midwest and New York
23 at different times, yes. He was in the Midwest and New York.
24 And he wanted them to be safely in the United States.

25 So, hypothetically, your Honor, if he got out on bail

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1 now, his only other ties, other than in the United States and
2 he is a citizen, are either where his wife and children are in
3 Canada, or in Lebanon.

4 And we know from the facts in the case that he can't
5 flee to Lebanon, especially now after all of this has been made
6 public. I think it's fair to say that he would be killed by
7 Hezbollah if he went to Lebanon, because it's now public
8 information that he approached the FBI to talk about Hezbollah
9 in exchange for help with his family being safe. And so, he
10 literally can't go to Lebanon.

11 Now, of course, he could go hypothetically to France
12 or Japan or Argentina or some other place. But, he doesn't
13 have any ties to those places. He would be under house arrest.
14 He wouldn't have a passport. He doesn't have the means to go
15 anywhere, other than, arguably, Canada or Lebanon, and he can't
16 go to Lebanon, and Canada would not be a safe location in the
17 mind of a fleeing defendant, because, of course, they are a
18 close ally of the United States.

19 And by the way, I should say if he were allowed out on
20 bail, and when I say "out" I mean under house arrest, with
21 strict pretrial detention and home confinement and electronic
22 monitoring. He would be willing to sign an extradition waiver
23 so if he could hypothetically go to Canada, he could easily be
24 returned.

25 The government's arguments to the contrary, I think a

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1 lot of it weighs on what they call the strength of the case
2 because my client confessed. On that point, I think the
3 evidence is not as strong as the government would have you
4 believe.

5 The recordings here -- withdrawn. I should say the
6 statements here are not recorded. So that, what happened
7 between my client and the agents is the subject of some
8 dispute. And I know from my experience myself, I was a
9 prosecutor for five years in the state court, I was an
10 assistant DA in Manhattan from '89 to '95, and in the state
11 court system, there's many more of these cases where it is
12 essentially a confession-only type of case. I don't see these
13 too often in the federal court system. And I know from my own
14 experience where the whole case rests upon the statements of
15 the defendant, and small pieces of corroborating information,
16 these are very, very difficult cases for the government to
17 prove for the simple reason that juries don't like them.
18 Nothing is recorded, it is not clear what was said. Even if
19 notes were taken, you have to rely upon several layers of what
20 I would consider to be unreliable evidence.

21 First of all, they would have to assume that my client
22 is reliable. So the government has to make the argument that
23 my client was honestly and reliably making statements. If what
24 he was saying was not honest and reliable, then, of course, he
25 can't be convicted. Because if he's not honest and reliable,

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1 there is no case.

2 Then the agents have to be honest and reliable. And
3 by honest and reliable, I don't mean that they're necessarily
4 going to come to court and fabricate stories. I don't think
5 they would do that. But, everybody's memory and everybody's
6 way of testifying is such that they come to court with a bias.
7 Just as I have a bias today. My bias is obviously in favor of
8 my client. The government witnesses' bias, of course, is in
9 favor of convicting my client. Juries know that.

10 And through those different layers, there is so much
11 room for reasonable doubt, especially where, as here, the
12 corroboration, I submit to you, is quite weak.

13 And it is not a trial, I'm not going to get into it
14 too much, but you know from the government's submission that
15 they claim that the corroboration for my client's statements
16 amounts to different kinds of digital or electronic proof. My
17 client made some internet searches that supposedly show that
18 he's somehow guilty.

19 I submit to you, your Honor, that people who search
20 things on the internet are not necessarily guilty of crimes. I
21 have a 20 and a 15-year-old son. Some of their internet
22 searches horrify me. I don't think that makes them terrorists
23 or even criminals. I don't think if my client looked up a
24 firearm on the internet, which might in and of itself even be a
25 legal firearm, that in any way corroborates the fact that he's

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1 providing material support to a terrorist organization. It is
2 just too huge of a leap, and it's not rationally related to
3 what's occurring.

4 Now, if they had some proof in the form of e-mails or
5 text messages or WhatsApp messages that show my client either
6 receiving or sending messages about actual terrorist activity,
7 that might be different. But, so far, at least in the evidence
8 that I've gotten in discovery, there is no such proof.

9 The proof amounts to generalized searches that any
10 person, innocent or guilty, might make. And doesn't confirm
11 the detailed statements that they claim he made.

12 So, for those reasons, your Honor, I think some
13 reasonable amount of bail, with home confinement and electronic
14 monitoring, in this case, is reasonable. It can't be that
15 simply because he's charged with material support to a
16 terrorist organization he must be detained. Otherwise Congress
17 would make the law that anyone facing these charges is
18 automatically detained, and I don't even have a right to seek
19 bail. So if he's not bailable, I don't know who else facing
20 these kind of charges would be bailable.

21 Thank you.

22 THE COURT: Mr. Bove.

23 MR. BOVE: Thank you, Judge. If I could, I'd like to
24 start where Mr. Schact started with what he called the basic
25 fact pattern, and talk a little bit about the legal framework

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1 and address some of the arguments made today.

2 The basic fact pattern, Judge, is that the defendant
3 was an operational terrorist here in the city who was part of a
4 sleeper cell surveilling targets, including a building across
5 the street. And that he did that, and then he admitted to it
6 five times, in five separate meetings.

7 Under those circumstances and everything that follows
8 from it, this is a man that should be detained pending trial.
9 The Bail Reform Act requires that. And we start here with the
10 presumption, because of the charges, that he is to be detained.
11 And the defendant has a burden right now of not just
12 criticizing the government's case but --

13 THE COURT: What's the statutory basis for the
14 presumption?

15 MR. BOVE: It's 18 U.S.C. 3142(e)(3).

16 THE COURT: Which subtitle?

17 MR. BOVE: Paragraph (B), Judge, says that the
18 presumption applies with respect to an offense under Section
19 924(c). There is a conspiracy charge in this case to violate
20 924(c). That's Count Five.

21 In addition, subparagraph (C) basically refers to
22 crimes of terrorism, also give rise to the presumption, and
23 here, the specific crimes that give rise to that presumption
24 are Counts One and Two, violations of the material support
25 statute, and Counts Three and Four, relating to defendant's

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1 efforts to obtain military-type training.

2 So, the defendant has a burden to actually put
3 evidence in front of you, Judge, that demonstrates that he is
4 not a flight risk, and not a danger to the community. And that
5 burden requires more than previewing his cross-examination of
6 the special agents who are here to my right, and he hasn't met
7 that burden.

8 The factors that relate to bail under this statute,
9 all of them support continued detention. The charges are very
10 serious. I don't think there is much dispute about that. The
11 defendant in total faces a statutory maximum of life
12 imprisonment. There is a dispute, obviously, about the
13 strength of the evidence, and I'll get to that in a moment.

14 The defendant's personal history and characteristics
15 here, I think some of the important ones are that he has almost
16 no ties here in the United States. And as the Court found in
17 its decision after the suppression hearing, he's already shown
18 an interest in doing what you called behaving strategically,
19 and I think this is a very strategic moment in these
20 proceedings.

21 The defendant started this case, the first pretrial
22 conference, explaining that he intended to move to suppress his
23 confession because it's obviously very powerful evidence of his
24 guilt. He's now lost that motion. That's going to come in at
25 this trial. And now he's asking to be released after he's

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1 faced that adverse decision. I think that's just another part
2 of the strategic behavior that you've seen in the case.

3 There are a couple arguments that Mr. Schact made
4 today that I'm happy to address. One relates to whether FBI
5 should have arrested Mr. Kourani mid-confession after meeting
6 one or after meeting two. The agency's decisions on that front
7 don't bear on the defendant's flight risk and danger to the
8 community.

9 THE COURT: It is a complicated interplay between
10 Mr. Kourani and the FBI agents. As I remember from the
11 suppression evidence, the FBI was interested in whatever help
12 Mr. Kourani could give, and Mr. Kourani offered help, but the
13 help turned out to be largely illusory. And so, one can
14 imagine that you have someone dangerous on the other side whom
15 you believe can be turned and become useful. And needs an
16 exploration. Obviously, a man can't be put in jail if you want
17 to get that kind of cooperation.

18 MR. BOVE: Judge, that's absolutely --

19 THE COURT: But these are prosecutorial decisions, not
20 judicial decisions.

21 MR. BOVE: That's absolutely right, Judge. And as
22 this was going on, in addition to the FBI's assessment of that
23 balancing that you're talking about between potential upside as
24 somebody cooperating proactively and obviously the risks posed
25 by his release, there was an ongoing criminal investigation.

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1 And we are doing work, and it is reflected in the search
2 warrants in this case, to develop additional evidence.

3 The FBI doesn't go arrest someone because they're
4 concerned, without further evidence, that he presents a danger
5 to the community. There was an ongoing investigation.

6 What prompted the defendant's arrest in this case,
7 because there were other steps taken to mitigate the threat he
8 posed. What prompted his arrest on the timing that happened
9 here was the defendant's threats through his counsel to flee to
10 Lebanon. The very place that he now says he couldn't possibly
11 go to. That just doesn't stand to reason, given the facts in
12 this case. Given that threat, given the fact that the
13 defendant still has family members --

14 THE COURT: I don't remember that threat.

15 MR. BOVE: That threat --

16 THE COURT: Did it come up in the evidence?

17 MR. BOVE: I don't think it came up in the suppression
18 hearing, Judge. But the reports relating to it are attached to
19 our brief in this case. Basically what happened is
20 Mr. Denbeaux started to call the agents and say, you know,
21 Mr. Kourani is telling me he wants to leave the country. He
22 wants to return to Lebanon. He's decided he's not getting what
23 he wants here. So he's going back home.

24 So, it's just disingenuous to suggest that he couldn't
25 possibly go back there. And I think that further supporting

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1 that, Judge, is the fact he's got relatives there right now.
2 As far as we are aware, he's still in contact with them, and
3 they haven't been harmed in any way.

4 I think the broader point here, though, is that the
5 Court shouldn't just be concerned about the defendant going
6 back to Lebanon. Right now the defendant is effectively a free
7 agent. There are a number of countries and a number of
8 organizations and groups who are --

9 THE COURT: Including disappearing in the United
10 States.

11 MR. BOVE: In addition to that, Judge. I think that
12 is also a risk. But I think the bigger concern here that
13 trumps, frankly, all of it is that the defendant, as I said, is
14 a free agent right now, who has obtained a great deal of
15 information. Information he obtained conducting surveillance
16 on behalf of Hezbollah, information he obtained during the
17 course of this case about the way that the FBI investigates
18 these things, and information about how the FBI's operated
19 generally in handling him.

20 So there are enemies in the United States, nations and
21 groups, all of whom would like access to that information.
22 Each of which could --

23 THE COURT: Give me a word about the strength of your
24 evidence.

25 MR. BOVE: Judge, just starting with the confession

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1 part of this. This is not just a one-time interaction. This
2 is a defendant who, as I said, five different times requested a
3 meeting with the FBI, and on each of those occasions admitted
4 to the elements of the crime.

5 During those meetings, he and his attorney actually
6 initialed photographs of the weapons that he handled. So
7 again, I understand the point these weren't videotaped, but
8 there are documents coming out of these that the defendant
9 placed his mark on to specify the types of violent training he
10 received to target the United States.

11 There is additional corroboration. We've discussed
12 some of it in our briefs. There are certainly parts of it that
13 are internet searches. But internet searches, there are parts
14 of the evidence that corroborate the confession are internet
15 searches relating to weapons that the defendant used. Internet
16 searches relating to propaganda arms of Hezbollah. In
17 addition, there are internet searches relating to some of the
18 U.S. assets that he targeted, at the direction of the IJO in
19 the United States. So --

20 THE COURT: IJO is?

21 MR. BOVE: Is the subgroup within Hezbollah that the
22 defendant operated for.

23 So, we're obviously going to have a trial, Judge, and
24 we'll see what the jury thinks about this evidence. But what
25 we have here are five separate confessions corroborated by

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1 internet evidence, corroborated by -- there is an e-mail
2 address that where the defendant said this is the code I would
3 use to communicate with my handler. I asked him to set up this
4 account. We found that account.

5 So there is powerful corroboration in this proof,
6 Judge. There is five separate confessions. We look forward to
7 trying the case, but for purposes of bail, and particularly in
8 light of the presumption that applies here, this is not a close
9 question. This is a man who needs to be detained and face the
10 jury.

11 THE COURT: Thank you, Mr. Bove.

12 Mr. Schact, last word.

13 MR. SCHACT: Just very briefly, your Honor. I think
14 if you cut through everything he's saying, he and I, Mr. Bove
15 and I actually agree on the evidence. It comes down to these
16 five statements, which are not all of the statements. And
17 remember, he calls it a confession. You know from
18 Mr. Denbeaux's testimony and from Mr. Denbeaux's one-page
19 letter that Mr. Denbeaux told the FBI in writing that my client
20 did not commit a crime and wasn't going to be prosecuted. Now,
21 Mr. Denbeaux may have been wrong about that and may have done
22 some malpractice or whatever word you want to use. But you
23 know from the undisputed facts that, in my client's mind, his
24 lawyer who was with him, told the FBI --

25 THE COURT: I don't credit it that way.

IA33KOUUC

1 MR. SCHACT: Well, I don't know --

2 THE COURT: Mr. Denbeaux was looking very hard to put
3 words in the FBI's mouths of some kind of immunization which
4 failed.

5 MR. SCHACT: Well, if that's what Mr. Denbeaux was
6 doing, my client --

7 THE COURT: So he said something, you agree that my
8 client has committed no crime. But the FBI agent never said
9 that.

10 MR. SCHACT: I know that. But I'm not talking about
11 the FBI agents' state of mind. I'm talking about my client's
12 state of mind and my client's state of mind --

13 THE COURT: He was very sophisticated. You take out
14 Mr. Denbeaux and in planning this approach in the way of
15 getting immigration help from the FBI.

16 MR. SCHACT: Judge, the law on material support to a
17 terrorist organization is complex, and no one knows what that
18 law is. And people in this room do, but my client didn't know.

19 THE COURT: We have all become expert in that.

20 MR. SCHACT: He's charged with, supposedly years ago,
21 he got training on machine guns in another country. I submit
22 to you that there is no reason for any educated citizen to know
23 that that might be a crime.

24 When I myself, I've been a defense lawyer for 28
25 years, when I think of gun possession, I think of being in a

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1 certain jurisdiction, do I have a gun, is it operable, do I
2 have ammunition, am I in the jurisdiction where I am being
3 charged. It is not rational for someone to think, because I
4 got firearms training in a country where my firearms training
5 was legal, that it might be illegal in the United States.

6 And so my client didn't think at that time, based on
7 what Mr. Denbeaux was telling him, that what he was saying was
8 some confession or admission. And when he left the meeting
9 without being arrested, that was reinforced in his mind.

10 THE COURT: Too many suppositions, Mr. Schact. That
11 issue came up in the suppression hearing. The suppression
12 hearing was all about a supposed statement by an FBI agent that
13 they were going to be told by Mr. Kourani, and I don't remember
14 the last part of it, but it had to do with protection he sought
15 for his family. He wanted desperately to get protection for
16 his father in Lebanon, and he wanted his wife and children to
17 immigrate to the United States from Canada.

18 MR. SCHACT: I agree with you. And I submit that the
19 evidence shows that he would say anything, true or false, in
20 order to get that. And that's part of the problem with the
21 proof.

22 THE COURT: Okay. Thank you.

23 The motion for bail is denied. I find that there is
24 no condition or set of conditions that can assure that the
25 defendant will not flee or that he will not endanger society by

IA33KOUUC

1 committing another crime. There is a long count of involvement
2 between the defendant and the FBI. And to fathom the purposes
3 that each had in dealing with the other is beyond the
4 capability of a district judge. But I went through some of
5 this in the suppression hearing, and I found that what
6 Mr. Kourani intended was a promise of confidentiality was not
7 such at all.

8 Mr. Kourani is charged, and there is evidence to
9 support it, of giving aid and comfort to terrorism, the
10 Hezbollah terrorist organization. Being trained by Hezbollah,
11 being involved with Hezbollah. Even in the complicated way
12 that Mr. Kourani states that he was persona non grata with
13 Hezbollah raises a question of not only the possibility of
14 flight, but also danger to our society.

15 As for flight, he has no important contacts here. His
16 family is in Lebanon. His wife and children are in Canada.
17 There a large potential community in which he could become
18 invisible in the United States. I find that the conditions for
19 possible flight are very high.

20 Accordingly, the defendant cannot overcome the
21 presumption that attaches in this case and the motion for bail
22 is denied.

23 Now, having said that, under our Constitution,
24 Mr. Kourani is presumed not to be guilty, as are all citizens
25 of the United States and residents of the United States. And

IA33KOUUC

1 so an early trial is desired. In the robing room we met
2 earlier to discuss the earliest possible trial date.

3 Mr. Schact, you have something in February, but I have a long
4 criminal trial previously scheduled for February. The first
5 date I can give you is?

6 THE DEPUTY CLERK: March 25.

7 THE COURT: March 25 at 10 o'clock. We'll get the
8 jury at that time. I'm told that this trial should last around
9 two weeks, I've allotted three week for the trial.

10 We should have a final pretrial conference by which
11 time all Brady, Giglio, Jencks material should be produced, and
12 at which time I will resolve all motions in limine. Other
13 requirements are in my rules.

14 So I think that final pretrial conference should be a
15 week before trial begins.

16 THE DEPUTY CLERK: March 19 at 11.

17 THE COURT: Why are all faces downcast today?

18 MR. SCHACT: That's fine with me, Judge.

19 MR. BOVE: We'll be there Judge. Thank you.

20 THE COURT: And I repeat that any motion in limine
21 will be heard at that time. So, the motions must be made and
22 fully posed by let's say five days before the hearing so I have
23 time to study it.

24 MR. SCHACT: That includes 404(b) motions, Judge?

25 THE COURT: It does. At the final pretrial

IA33KOUUC

1 conference, I will also want any particular voir dire questions
2 that you want me to ask. I don't need the boilerplate. And
3 any request to charge that you'd like me to consider. And if
4 the parties have briefs, that would be fine, too.

5 Anything else?

6 MR. BOVE: Other than a request for exclusion of time,
7 Judge, nothing from the government. We do ask that time be
8 excluded until March 25, the trial date, in the interest of
9 justice in order to give the parties time to prepare for trial.

10 THE COURT: Any objection, Mr. Schact?

11 MR. SCHACT: No, your Honor.

12 THE COURT: Without objection, so ordered.

13 We discussed a number of, we'll do it now, I
14 customarily try criminal cases with two alternates. I think
15 that should be satisfactory here.

16 MR. BOVE: That sounds appropriate to us, Judge.

17 MR. SCHACT: Two is fine for a two-week trial. I
18 agree.

19 THE COURT: There are 10 peremptories available to the
20 defendant and six to the government. The array will be some
21 number from which 32 are seated. I'll ask a series of
22 questions to the jury, and challenges for cause will be taken
23 as they come.

24 If any juror can't sit, or a challenge for cause is
25 upheld, another juror will be taken from the array and put in

IA33KOUUC

1 that juror's place. There is also a process at the end by
2 which the jurors will tell something about themselves.

3 At the end of this process, I'll ask if there are any
4 more questions, and if there are none, we then go into the
5 peremptories. They're to be exercised from your bench. Each
6 side will have a sheet of paper and list peremptories
7 separately. It is a process that should take about 15 minutes.
8 At the end of that, we'll go into the robing room and go over
9 these with you.

10 If fewer than all the peremptories are exercised, or
11 if both sides choose the same person as the objects of the
12 peremptories and there is fewer than 12 coming out of the
13 original 28, I will then exercise challenges.

14 In other words, we take the first 28 of the 32, and we
15 see if there are any peremptories with regard to those. At the
16 end of the exercise of the peremptories, if there are any left
17 of the 28, more than 12, I will excuse the highest number
18 involved in that process. And then at the same time you will
19 do the same for the alternates, which would be Jurors No. 29,
20 30, 31 and 32. Each side has one. And similarly, if you agree
21 on one of the peremptories, or if you don't exercise it, I will
22 excuse Juror No. 32 and so on coming down until we have a jury
23 of 12 jurors and two alternates.

24 If clarification is required, we can go into it
25 further at the pretrial conference.

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1 MR. BOVE: Thank you, Judge. That was very helpful.

2 THE COURT: Okay. Thanks very much.

3 MR. SCHACT: Thank you.

4 MR. BOVE: At this time we'll convene the ex parte
5 CIPA Section 2 conference in the robing room.

6 (Adjourned)

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